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PROPOSED REFORMS IN MARRIAGE AND DIVORCE LAWS.

Fourteen among the leading lawyers of this country issued a proposal July 1st, 1878, for an informal meeting at Saratoga Springs, New York, on August 21st, 1878, to consider the feasibility and expediency of establishing an American Bar Association, in consequence of a suggestion made six months earlier by one of the state bar associations. In response to this call seventy-five prominent members of the bar and others met upon the day suggested and formed the American Bar Association. Article 1 of the draft of a constitution adopted, stated the object to be

"to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American bar."

This article remains unchanged to the present day, and "uniformity of legislation throughout the Union" is therefore a prime cause of the existence of this association.

At the second annual meeting of the association, held in 1879,[1] on motion of Mr. King of Ohio it was resolved

"that the committee on Jurisprudence and Law Reforms be requested to report at the next annual meeting of the association a synopsis of the laws of marriage and divorce in all the states and territories and the District of Columbia, with such recommendations as they may deem expedient for bringing about more uniformity in such legislation * * *."

The subject was of such importance that the committee

[1] See 2nd annual report 1879, p. 18.

were not prepared to report until the 5th annual meeting in 1882[1]. This committee did not deem it advisable to attempt any scheme looking to uniformity of legislation in respect to the forms of marriage or the grounds of divorce, but recommended rather, an attempt to gain the general consent of the states to confine their jurisdiction over proceedings in divorce as regards non-residents, within more definite if not more narrow limits. To this end they reported, that unless one party at least, can show a domicile in a petition for divorce as distinguished from a mere residence in the state where the petition is filed, jurisdiction ought to be declined by the court. They therefore recommended the following draft act to prevent fraudulent divorce, suggested in David Dudley Field's Project of an International Code, Arts. 674–677:

"AN ACT TO PREVENT FRAUDULENT DIVORCES.

The jurisdiction of the courts of this state, in suits for divorce, shall be confined to the following classes of cases:

1. Where both parties were domiciled within this state when the action was commenced.

2. Where the plaintiff was domiciled within this state when the action was commenced, and the defendant was personally served with process within this state.

3. Where one of the parties was domiciled within this state when the action was commenced, and one or the other of them actually resided within this state for one year next preceding the commencement of the action."

This recommendation was adopted and the committee was directed by the association to take suitable action with reference to the presentation of the act proposed to the different state legislatures.

The next meeting the committee reported verbally[2] that the committee had caused the act with another, on another subject, to be presented to the different state legislatures, and the State of Minnesota had passed the act in relation to fraudulent divorces.

The same committee on Jurisprudence and Law Reform, through its chairman, William Allen Butler of New York, made a further verbal report at the meeting of the

[1] See report of the 5th annual meeting 1882, p. 287.

[2] See report 6th annual meeting 1883, p. 38.

association in 1884,[1] stating that the divorce act, as well as an act relating to the acknowledgment of deeds, recommended by the association, had been communicated to the legislature of every state represented in the association, through the medium of the local councils.

The interest and concern of the association in all matters relating to marriage and divorce is well illustrated by the resolutions adopted at the meeting held in 1887. The first instructed the committee on Jurisprudence and Law Reform

"to inquire and report at the next meeting whether it would be desirable to promote the enactment in the several states of some uniform law (and if so in what form) to regulate the marriage of their citizens in foreign countries, and the proper authentication and registration of such marriages in this country."[2]

The second resolution requested the committee on Jurisprudence and Law Reform

"to consider and report at the next annual meeting what legislation, if any, it may deem necessary to correct the irregularities in, and evils growing out of, the present laws relating to marriage and divorce."[3]

The next year the committee made an elaborate report, not only upon these resolutions, but also upon the resolution adopted in 1879.[4]

The committee reiterated their approval of their proposed act recommended in 1882, that had been enacted in at least two states, Minnesota and New Hampshire, and a resolution was adopted reaffirming the conviction of the association that such legislation is necessary in every state, to make the divorce procedure of this country conform to the principles of international law, and urging on the members of its local councils, and the several states and local bar associations, to secure the introduction of such a bill at the next session of the legislature in their respective states, and to advocate a favorable report from the committee to which it might be referred, and that a copy of this report and resolution be sent by the secretary to the governors of the several states and territories, with a request that the subject might be by message presented to the several legislatures.[5]

[1] See reports of 1884, p. 12. [2] See reports for 1887, p. 81.
[3] Reports 1887, p. 87. [4] See reports 1888, p. 307.
[5] See reports 1888, pp. 59 and 55.

The committee reported, both verbally and by written report, valuable information on the subject of foreign marriages of Americans.[1]

Their act concerning foreign marriages, as amended, is as follows:

AN ACT CONCERNING FOREIGN MARRIAGES.

"SEC. 1. Marriages in a foreign country between citizens of this state or between a citizen of this state and a foreigner, or between a citizen of this state and a citizen of any other of the United States, or territories and the District of Columbia, shall be valid, if celebrated according to the laws of such country.

"SEC. 2. Marriages in a foreign country between citizens of this state, or between a citizen of this state and a foreign woman, or between a citizen of this state and a woman who is a citizen of any other state or territory or the District of Columbia, shall be valid, also, if celebrated at a legation or consulate of the United States, by a diplomatic or consular officer of the United States connected with such legation or consulate, or, in his presence, by any minister of religion.

"SEC. 3. Such diplomatic or consular officer shall cause a record of the marriage to be kept at such legation or consulate, and shall sign and give to each of the parties so married, a certificate of such marriage, and shall send another to the Department of State at Washington, and another to the Secretary of this state for record; and such certificate under the seal of the legation or consulate, or a certified copy of the record thereof from the Secretary of this state, shall be legal evidence of such marriage. Such certificates shall specify the names of the parties, their ages, places of birth and residence, the date and place of marriage, and the name of the official, or ecclesiastical, position of the person by whom the marriage was celebrated.

"SEC. 4. Every man so married, shall, within three months after his return to this state, deliver such a certificate of his marriage, or a copy from the office of the Secretary of the state of the record of such certificate, to such recording officer, if any, as under the laws of this state as then existing, would be required to register or record such marriage, had it occurred at the home of the husband within this state; and for any neglect of such delivery, he shall forfeit $20.

"SEC. 5. This act shall not apply in favor of any citizen of this state, who, in order to evade any of its laws and with the intention of returning to reside here, shall go into any foreign country and be married there, and afterward return and reside in this state; or who is under the age of twenty-one years, at the time of the marriage, unless the written consent of his or her father or guardian to such marriage is filed in such legation or consulate before the marriage."[2]

It was also resolved to request the several Local Councils and State Bar Associations to cause this bill to be

[1] See reports 1888, pp. 50 and 313. [2] See reports 1888, p. 56.

introduced at the next session of the legislature in their respective states and to advocate its enactment.[1]

At the annual meeting in 1889[2] W. A. Collier, of Tennessee, stated that at a recent meeting of the Bar Association of Tennessee the president had made some wise suggestions in reference to uniformity of laws in his address: and this address had been referred to a committee which had reported thereon, and in obedience to their request he now submitted the following resolution:

"Recognizing the desirability of uniformity in laws of the several states, especially those relating to marriage and divorce, descent and distribution of property, acknowledgment of debts, execution and probate of wills; therefore be it

Resolved, That the President of this Association appoint a Committee, consisting of one from each state, who shall meet in convention at a time and place to be fixed by the President and compare and consider the laws of the different states relating to these subjects, and prepare and report to this Association such recommendations and measures as will bring about the desired result."

The resolution was adopted, the President appointed the Committee, and the list, consisting of forty-two members, may be found at page 96. It has been appointed annually ever since then, the number of its members increasing as other states have had representatives added, and at the annual meeting in 1903 it was constituted one of the Standing Committees, the constitution being changed to bring this about.

This Committee (on Uniform State Laws) made its first report the following year.[3] They reported that the State of New York had passed an act authorizing the Governor, by and with the consent of the Senate, to appoint three commissioners for the Promotion of Uniformity of Legislation in the United States,

"to examine the subjects of marriage and divorce, insolvency, the form of notarial certificates, and other subjects; to ascertain the best means to effect an assimilation and uniformity in the laws of the States and especially to consider whether it would be wise and practicable for the State of New York to invite the other States of the Union to send representatives to a convention to draft uniform laws to be submitted for the approval and adoption of the several states, and to devise and recommend such other course of action as shall best accomplish the purpose of this Act."

[1] Reports 1888, p. 15. [2] Reports for that year, p. 50.
[3] Reports for 1890, p. 336.

The Committee recommended the passage by each state and by the Congress of the United States for the District of Columbia and the Territories, of an act similar to the above, inserting further, as proper subjects requiring uniformity of legislation, "descent and distribution of property, acknowledgment of deeds, execution and probate of wills." They recommended also that the Secretary be instructed to cause the report and accompanying resolutions to be printed and to send copies to the members of the General Council, the Vice-President and to the members of this Committee in each of the States and Territories and District of Columbia, with the request that they unite in preparing, presenting and securing the passage of a similar bill in their respective states and territories. The report and resolutions were adopted, Mr. Louis H. Pike, of Ohio, stating that the same subject had been considered by the Ohio State Bar Association and by the National Bar Association; and that some of the recommendations of the latter in regard to it had been adopted by some of the state legislatures and some action had been taken upon it.

This committee on Uniform State Laws made its second report 1891,[1] stating that as it had been found impossible for the members to meet in convention, a circular had been issued by the chairman and sent to each member requesting answers to inquiries as to what steps had been taken looking to the formation of a Commission on Uniformity of Laws in the recipient's state; and in what respect greater uniformity in legislation is deemed desirable and practicable, etc. Answers were received from most of the states, from judges of the highest courts, and from lawyers who had made a study of inter-state law. Commissions had been appointed on Uniformity of Legislation in New York, Pennsylvania, Massachusetts, Michigan, New Jersey, and Delaware. The Committee found a substantial agreement of opinion that the desired uniformity could be best secured by legislative action in the states, a conclusion that has been verified by the results of subsequent experience.

"There was a substantial agreement in the view that the most urgent and immediate need of uniformity or unification was in the matters affecting directly the business common to and co-extensive with the whole

[1] Reports for 1891, p. 365.

country, such as the enforcement of contracts, the validity, negotiability and construction of commercial paper and the formalities of all legal instruments and the proofs of their authenticity. It was apprehended that sudden, radical and fundamental changes in the laws of Divorce, Descent and Distribution, however desirable, would meet with the greatest difficulty, and in most states changes would be more likely to be adopted, if at all, after the general advantages of uniformity in commercial matters had been demonstrated by experience."[1]

The Committee on Uniform State Laws has reported from year to year to the American Bar Association the appointment by state after state of Commissions on Uniformity of Legislation. As these Commissioners thus appointed by the States met in Conference each year the same week the American Bar Association met and in the same place with them, and does so still, it resulted naturally that the work on Uniformity of Legislation has been done at the Conference, and no longer by the Committee on Uniform State Laws of the American Bar Association.

Many of the earlier annual Reports of the Conference are already out of print and it is not possible now to supply a complete set. The First Conference took place at Saratoga Springs, New York, on the 24th and 25th days of August 1892, and the second at New York City on the 15th and 16th days of November 1892. Commissioners appointed for the Promotion of Uniformity of Legislation from the States of New York, Massachusetts, Pennsylvania, New Jersey, Michigan, Delaware and Georgia were in attendance. The work of the Conference is carried on through Committees of its members and among the most active and important of these Committees is that on Marriage and Divorce. The Commissioners, usually three from each state, are appointed by the Governor, under laws of the respective states creating them, with authority to confer with commissioners from other states and to recommend forms of bills or measures to bring about uniformity of law in the laws relating to commercial affairs, marriage and divorce and other subjects, where uniformity seems desirable and practicable.

At the first Conference held as above stated in 1892 the following resolutions were adopted on the subject of Marriage and Divorce:

[1] Page 366.

MARRIAGE.

"*Resolved*, that it be recommended to the State Legislatures that legislation be adopted requiring some ceremony or formality, or written evidence, signed by the parties, and attested by one or more witnesses, in all marriages; provided, however, that in all states where the so-called common law marriage, or marriage without ceremony, is now recognized as valid, no such marriage, hereafter contracted, shall be valid unless evidenced by a writing, signed in duplicate by the parties, and attested by at least two witnesses.[1]

"*Resolved*, that we recommend to the several Legislatures further to provide that it shall be the duty of the magistrate or clergyman solemnizing the marriage to file and record the certificate of such marriage in the appropriate public office.

"*Resolved*, that in cases of common law marriages, so-called, evidenced in writing, as above provided, it shall be the duty of the parties to such marriage to file or cause to be filed such written evidence of their marriage, in an appropriate public office, within ninety days after such marriage shall have taken place, and that a failure so to do shall be a misdemeanor.

"*Resolved*, that it would be further recommended to the Legislatures that in case the certificate last mentioned be not filed as aforesaid, or if no subsequent ratification by both parties, evidenced as aforesaid by like writing, be filed, then neither party shall have any right or interest in the property of the other.

"*Resolved*, that we recommend to all the states that stringent provision be made for the immediate record of all marriages, whether solemnized by a clergyman or magistrate, or otherwise entered into, and that said provisions be made sufficiently stringent to secure such record and the full identification of the parties."

The following resolution, passed at the meeting of the Conference held at Saratoga, was re-adopted, viz.:

"That the age of consent to marriage should be raised to eighteen in the male, and sixteen in the female."

DIVORCE.

"*Resolved*, that it is the sense of this Conference that no judgment of decree of divorce should be granted unless the defendant be domiciled within the state in which the action is brought, or shall have been domiciled there at the time the cause of action arose, or unless the defendant shall have been personally served with process within said State, or shall have voluntarily appeared in such action or proceeding.

"Where the defendant shall not be domiciled in the State in which such action is brought, or shall not have been domiciled therein at the time

[1] At the Fifth Conference, 1895, (see p. 14 of that year's Report) it was resolved to strike out the clause in this resolution beginning "provided, however."

the cause of action arose, the plaintiff must prove either that the parties have lived together in that state as husband and wife, or that the plaintiff has in good faith resided in said State for at least one year next preceding the commencement of the proceeding.

"*Resolved*, that it is the sense of this Conference that in all libels for divorce for adultery with some person named therein, such person shall be made a co-respondent, and personal service of the libel shall be made upon such person, unless it appear to the court that such service was impracticable.

"*Resolved*, that where a marriage is dissolved both parties to the action shall be at liberty to marry again."

It was also resolved that the Legislatures of the States be recommended to pass laws in conformity with the foregoing resolutions.

At the Sixth Conference, 1896[1] the committee on marriage and divorce reported that a bill had been drafted to secure uniformity with regard to some branches of the subject, that would be perfected and submitted to the Conference at its next annual meeting, because in view of the importance of the bill on negotiable instruments then under discussion by the Conference, it was deemed wise to defer the discussion on the bill concerning marriage and divorce until the next session of the Conference.

At the Seventh Conference, 1897[2] the committee on marriage and divorce submitted a draft of a proposed uniform law relative to divorce. The chairman stated that this act was modelled after the divorce law of the District of Columbia, which had been carefully revised by the judiciary committee of the House and Senate, and passed by Congress. The act is not given in full here, for it was subsequently modified before its final adoption, and will be given later in the form in which it was adopted.

At the Eighth Conference, 1898[3] the committee on marriage and divorce reported that careful consideration had been given to the bill presented at the last year's Conference. The general sentiment of the committee was to make the proposed legislation as simple as possible in the first instance, merely embodying in a few sections the cardinal principles of the forms of procedure unanimously recom-

[1] See p. 8 of that year's report.

[2] See pp. 5 and 7 of that year's report.

[3] See p. 5 of that year's report.

mended by the Conference. For this reason sections 9 to 16 inclusive of last year's bill had been omitted for the present, as they covered matters of alimony, support of children, and their custody and control, already fully covered by statute in all the states and calling for no special reform. A long discussion followed, a summarized report of which may be found on pp. 7, 8 and 9 of that year's report.

At the Ninth Conference, 1899[1] the committee on marriage and divorce submitted to the Conference, for general discussion, a draft of a proposed bill on divorce and divorce procedure. After discussion, in detail, section by section, this was divided into a bill relating to causes for divorce and a bill relating to procedure. After three days discussion these acts were adopted in the following form:

"An Act to Establish A Law Uniform with the Laws of other States Relative to Divorce Procedure and Divorce from the Bond of Marriage.

Be it enacted, etc.

SEC. 1. No divorce shall be granted for any cause arising prior to the residence of the petitioner or defendant in this state, which was not a ground for divorce in the State where the cause arose.

SEC. 2. No person shall be entitled to divorce for any cause arising in this state who has not had actual residence in the State for at least one year before bringing suit for divorce with a bona fide intention of making this State his or her permanent home.

SEC. 3. No person shall be entitled to divorce for any cause arising out of this State unless the petitioner or defendant shall have resided within this State for at least two years next before bringing suit for divorce, with a bona fide intention of making this State his or her permanent home.

SEC. 4. No person shall be entitled to a divorce unless the defendant shall have been personally served with process, if within this state, or with personal notice duly authenticated, if out of this State, or unless the defendant shall have entered an appearance in the case; but if it shall appear to the satisfaction of the court that the petitioner does not know the address nor the residence of the defendant, and has not been able to ascertain either, after reasonable and due inquiry and search continued for one year, the Court or Judge in vacation may authorize notice by publication of the pendency of the petition for divorce to be given in manner provided by law.

SEC. 5. No divorce shall be granted solely upon default, nor solely upon admissions by the pleadings, nor except upon trial before the Court in open session.

[1] See p. 5 of that year's report.

SEC. 6. After divorce either party may marry again, but in cases where notice has been given by publication only, and the defendant has not appeared, no decree for divorce shall become final or operative until six months after trial and decision.

SEC. 7. Wherever the word "divorce" occurs in the act it shall be deemed to mean divorce from the bond of marriage."

At the Conference in 1900 the words "or with personal notice duly authenticated if out of this state" in section 4 were stricken out and the following words were inserted in lieu thereof, "or if without this state shall have personal notice duly approved and appearing of record," and the words "six months" were substituted for "one year" after the words "after reasonable and due inquiry and search continued for" in the same section. In section 5 the word "trial" was changed to "hearing" in the second line. At the Eleventh Conference in 1901[1] the word "bonds" was changed to "bond" in the Sixth Section in the act on procedure and in section 2 of the act relative to migratory divorces.

"An Act to Establish A Law Uniform with the Laws of other States Relative to Divorce.

Divorce from the bond of marriage shall be granted for the following causes arising after marriage: Adultery, extreme cruelty, habitual drunkenness or the confirmed habit of intoxication, whether arising from the use of drinks or drugs; conviction of felony, with sentence of imprisonment to a state prison or penitentiary; and continuous desertion for at least—— years.

Divorce from the bond of marriage shall not be granted for any other cause arising after marriage."

The chairman of the committee on marriage and divorce, the writer of this article, commented as follows upon these acts in the report of the Ninth Conference, 1899, at page 70:

"One of the greatest abuses in the procurement of divorces is well known to be due to what are known as migratory or carpet-bag divorces. One or the other of a married couple—sometimes both—want a divorce. They find they have no ground for divorce in the state where they live, but upon examination of the law in various states of the Union, they find there is a state that grants divorce for something that comes within their own experience. Straightway the one wanting the divorce the most moves to that state, and stays there the time necessary to give jurisdiction to the petitioner as an inhabitant of that state, files petition for a divorce upon the

[1] See report of that year p. 11.

particular ground he or she has discovered to be a cause for divorce in that state, but which is not ground for divorce in the state where it occurred. Notice is given to the other party who (in reality collusively) makes no defence, depositions are taken, a hearing is obtained, and a decree for divorce follows, ending, as soon as it is made absolute, in the speedy departure of the successful petitioner who has thus abused the process of the state. A wonderful change as to the petitioner's intention to make that state his or her permanent home becomes immediately manifest when the decree becomes absolute. The object of the first section of the bill proposed is to put an end to this scandalous state of affairs. It will not prevent one from moving into a state, gaining a residence there and then obtaining a divorce because of some cause for divorce that has arisen in that state since the change of residence (and there is no reason, it is submitted, why such a divorce should not be obtainable). But it will prevent a change of residence in order to procure a divorce for a cause that arose in another state before the change of residence. This will tend greatly to uniformity by removing one of the causes of temptation for migration, i. e., migration to obtain a divorce for some cause that occurred in the home state, that is not a cause for divorce there, although it is a cause for divorce in the state in which it did not occur and into which the petitioner moves for the purpose of procuring a divorce. The greater uniformity thus brought about will protect each state from having its own citizens defying its laws by simply going temporarily into another state, obtaining a divorce there that could not be obtained in the home state, and then returning to the home state, after having successfully evaded its law. Migratory or carpet-bag divorces would thus be largely stopped."

Sec. 2 is intended to introduce uniformity as to the length of time required in the various states, in the case of petitioners for divorce coming into the state from another state. It also makes it requisite that the petitioner have a bona fide intention to make the state into which he or she has come, his or her permanent home. Section 3 is intended likewise to prevent the too easy application for divorce, by a petitioner moving into a state, for a cause for divorce that arose in another state.

It is well known that a fertile source of wrong doing in divorce cases is afforded where divorce can be obtained without the knowledge of the other party. Theoretically, no divorce should ever be granted until the court has adequate proof that the other party has had notice of the pendency of the petition. The object of the first part of Section 4 is to secure this notice and proof of it for the court. In practice however, provision must be made for those cases where the opposite party cannot be found. Not to provide

for such a contingency would simply be to place a premium upon concealment—the party desirous of preventing divorce would simply go into hiding and then no divorce could be obtained, no matter how valid the reasons for granting it. Every conceivable means have been taken in this section to guard against fraud. Before the Court can authorize notice by publication, it must appear to the satisfaction of the Court that the petitioner does not know the address nor the residence of the defendant, and has not been able to ascertain either after reasonable and due inquiry and search continued for one year. A petitioner intending to commit a fraud of this kind would hardly care to wait a year, but instead of concealing the address and residence of the respondent a year, to make then a false affidavit, he would disclose it at once, to save waiting a year. And it is worthy of note that these provisions as to notice to non-resident respondents are in accord with Wharton's ideas.[1] Section 5 is intended to guard against collusive divorce proceedings and to insure due publicity. It has been suggested that no divorce should be granted unless an actual defence is made. This would make it necessary for the state to defend all cases where the respondent fails to defend. The objection to this is that it would involve the state in great and ever increasing expense, and further, such a defense would be only perfunctory. Section 6 provides that where notice has been given by publication only and the defendant has not appeared, six months shall elapse before the decree of divorce shall become final or operative.

From this brief examination of the bill it will be seen that in reality it does more than reform the procedure in divorce proceedings. In various particulars it goes to the substance of the matter. It is therefore confidently submitted that its general adoption would go far, under a system of adequate and uniform application (for which we must depend upon the courts), towards minimizing the lax and incoherent system now in force in many of the states.

This then is the bill as proposed in 1898, with the amendments since made. The Committee on Divorce in 1898 did not deem it wise to undertake action looking to the adoption of uniform legislation for the causes for divorce.

[1] See the 2d ed. Wharton on Conflict of Laws, sec. 237.

They recognized the diversity of law and of sentiment upon this subject and felt content with an act relating principally to procedure only. For the development of the rights has depended upon the development of forms of action in our English system of law.[1] The law of procedure or the adjective law, as Bentham and his followers prefer to call it, in the long run has always had a profound influence upon the substantive law.[2] There is therefore no cause for discouragement should we confine ourselves to procedure only in attempting to improve the law of divorce. That which in the beginning would be mostly only improvement in procedure would end in improvement in the very substance of the law.

It is claimed, however, that this is not enough, and that a bill should be proposed that shall enumerate the causes for divorce and which shall prohibit divorce for any other cause. In view of the expression of a very general sentiment of this kind, a bill was drafted and submitted at the Conference in 1899 by the writer that if adopted would result in uniformity in the causes for divorce in the various States and territories in the Union, omitting those few states that have such peculiar laws on this subject they cannot be expected to join the other states on any common basis. This bill on Uniform Causes for Divorce was submitted separately. Both bills were continued until the next annual Conference for the careful examination of all the other members of the American Bar Association, of the bar throughout the country, of the clergy of all religions and denominations and of the public at large, for all are vitally interested in this momentous question. The Committee on Divorce and the Conference of Commissioners on Uniform Legislation solicit the advice, assistance and suggestions of all concerned in arriving at conclusions on this most important subject. In its consideration extremes of all kinds are to be avoided. No uniform system can be formulated upon the system of one state that grants no divorces whatever (South Carolina) nor upon the system of another that is unique in granting absolute divorce only for adultery

[1] 2 Pollock and Maitland, Hist. of Eng. Law 559.

[2] Holmes, C. L. 253; 1 P. & M. Hist. Eng. Law 208; Hammond 3d Bl. Comms. 187.

(New York). Nor can a uniform law acceptable to the country at large be formulated upon an extreme ecclesiastical theory which is not accepted even in Great Britain, Germany or France. On the other hand no law for general adoption throughout our States and Territories will be acceptable to an enlightened public opinion that grants divorce for causes involving no moral wrong. The holy state of matrimony cannot be allowed to be terminated except for real cause. However desirable it may be that men and women in marital relation should not be separated until parted by death, it is obvious that public opinion requires that the law shall provide for divorce for adequate cause. The question is then, what shall constitute adequate cause? And what rules of procedure shall be followed?

An examination of laws as to the causes for divorce in the States and Territories in the Union, showed that in forty-nine of them divorce was granted for adultery; forty-nine for extreme cruelty, of which seven were limited divorces; forty-nine for continuous desertion, of which four were limited divorces. Failure to support the wife was also a cause for divorce in many of the states, but this has become a fertile source of divorce obtained collusively, the husband agreeing not to oppose the wife's petition, if brought upon this ground only. The husband rarely considers it a disgrace to be reputed not to support a wife he does not want to live with, and hence he assents not to oppose a petition brought upon this ground only. Of old, and almost to the period of the present generation, a woman's resources were limited, and it was difficult for her to procure a living. There was a certain propriety, indeed a necessity, for allowing divorce upon the failure of the husband to support his wife, as she could not support herself. But now, when in some states married women are enabled, by statute, to contract as if unmarried, where so many resources are open to all women that formerly were closed to them, when we see women everywhere, married and single, earning their own living, there is no longer any reason left for granting divorce for failure to support the wife. Omitting therefore this cause for divorce, the bill submitted is an attempt at a Uniform Act that embraces only those causes for divorce that are already good causes

for divorce in most of the States and Territories of the Union. Omnibus clauses, so called (allowing the court to grant divorce "for any reason satisfactory to the court," or "for any cause defeating the purpose of the marriage relation"), were omitted, because they have proved to be a fertile cause of abuse. With fifty different States, Territories and the District of Columbia, there can be no uniformity in the exercise of fifty different judicial discretions. The system would tend to vary more and more from one of fixed law to one of uncertain application of an arbitrary discretion. It was felt to be extremely desirable that before acting on these bills, an educated public opinion would declare whether it desires the passage of either, or neither, or both of these bills. They should therefore become known and be thoroughly discussed throughout the country.

At the Conference in 1900 the act of divorce procedure was again taken up and considered section by section.[1] Some changes were made in the act, already above noted. It was voted to confine the efforts of the Conference to the proposed act on divorce procedure and to postpone action on the bill relating to causes. In the report of the Committee on Uniform State Laws to the American Bar Association at its 23rd annual meeting 1900[2] the above divorce procedure act was given in full, was highly approved and its adoption was urged. The report spoke highly of the purpose, wisdom and practicability and also of the effect of this "short, simple and most moderate act." The report quoted largely from the report of the Conference of 1899 and cited with approval the view of Mr. Nelson on divorce and separation,[3] as to remarriage, as follows:

"The evident intent of these statutes is to prevent the guilty party from entering into another marriage. He having been unfaithful to the obligations of the first marriage, it is presumed that he is unfit to enter into a second marriage unless he reforms. But such prohibition is in fact a restraint of marriage. It leaves at large a person who by false representations may induce an unsuspecting woman to enter into a void marriage; or if this does not occur, the unfortunate defendant who cannot marry is tempted to continue adulteries without incentive to reformation. A prohibition which restrains marriage encourages adultery, leaves the party in

[1] See report of that year pp. 6 & 7.

[2] See reports for that year p. 395. [3] Vol. 2, p. 566.

a position to contract void marriages, and takes away a natural incentive to reformation, should be held contrary to public policy. These considerations are sufficient to justify the repeal of such statutes."

At the Eleventh Conference, 1901, the Committee on Marriage and Divorce reported as follows:[1]

"The act adopted at last year's Conference has not yet been adopted in any state. A variety of causes, unnecessary to specify, has contributed to this result. Nevertheless your committee see no reason for change in the proposed act, except in form. The experience of several commissioners with regard to the adoption of this act by their respective legislatures, during the last year, has shown unexpected objection to section 1. Its purpose being the prevention of migratory divorces, it may be said it does not relate to procedure, but to the causes for divorce. In the opinion of your committee, while it is desirable to secure the passage of all the sections of our proposed act, there can be no objection to submitting section 1, as a separate independent act, and the other seven sections as another separate and independent act, to the various state legislatures.

Since the adoption of this act a year ago, four important decisions in divorce cases have been rendered in the Supreme Court of the United States. These are Atherton *v.* Atherton, Bell *v.* Bell, Streitwolf *v.* Streitwolf, and Lynde *v.* Lynde. An examination of these cases as reported in opinions of the United States Supreme Court, No. 13, October term, 1900, L. S. P. Co., leads to the conclusion that nothing therein contained is at variance with the provisions of our act. On the contrary, the decision in Atherton *v.* Atherton (that constructive notice upon the defendant in another state of the pendency of a petition for divorce, with the observance of reasonable precautions for notifying the respondent prescribed by the statute of the state where the petition was filed, is sufficient) shows that the observance of the provisions of section 4 of our act, with regard to substituted service, where personal service cannot be had, would undoubtedly be supported by the Supreme Court of the United States, as valid and sufficient, should a case be carried there, to test the validity of such notice. In Bell *v.* Bell it was decided that no decree of divorce from the bond of matrimony is valid, on constructive service, by the court of a state in which neither party is domiciled. In Streitwolf *v.* Streitwolf the Supreme Court found there was no bona fide domicile in the state in which the decree of divorce was obtained, and it was therefore invalid; while in Lynde *v.* Lynde it was decided that there was no color for the contention of the defendant that he was deprived by the decree of his property without due process of law, he having appeared and having been heard in the proceedings for alimony.

Your committee therefore submit two separate acts, and recommend that the members of the conference endeavor to secure the passage of both by their respective legislatures."

[1] See report of that year p. 8.

The report of this committee was accepted and it was voted to separate the bill as provided in the report and to recommend the passage of both acts.

In his annual address at the Twelfth Conference, 1902, the president spoke as follows on these divorce acts:

"I cannot, however, report success in either of our Uniform Divorce Acts. So far as is known to me, not a single State has adopted either Act, although perhaps, as was the case in Rhode Island, our proposed Acts have led to changes that are improvements in pre-existing legislation on divorce. It is evident, however, that our proposed divorce acts do not obtain public favor. For this reason it is deemed wise to reconsider them at this Conference.

In case of the breach of an ordinary contract jurisdiction over the parties is not limited to the domicile of either party. It is enough if the plaintiff can serve process on the defendant. And the case is not tried according to the law of the domicile of either party but according to the law of the place where the contract was made. Why is it that the same rule does not prevail in case of a breach of the contract of marriage?

A brief examination of the different views held by the different courts as to jurisdiction over divorce cases will show the conflict there is between them, how irreconcilable they are with each other and the necessity existing for the adoption of some sound general principle in this important branch of law.

(A) The general rule on the Continent of Europe is that the court of the parties' nationality alone has jurisdiction.[1]

(B) The general English and American rule is that the court of the parties' domicile alone has jurisdiction. This may be divided:

1. The English rule is that the court of the husband's domicile alone has jurisdiction, since the wife cannot acquire a domicile apart from her husband's.[2]

2. The court of the domicile of either spouse has jurisdiction (see post, Domicile of Wife).[3]

3. The court of the petitioner's (or libellant's) domicile alone has jurisdiction (See Post, Domicile of Wife). This is the common statutory rule in the United States.[4]

4. The court of the plaintiff's domicile alone has jurisdiction (See Post, Domicile of Wife) unless that domicile has been changed since the cause for divorce arose.[5] (This rule is adopted in New York without the qualification given, People *v.* Baker (1879) 76 N. Y. 78)

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[1] Wilhelm *v.* Wilhelm (1896) 23 Cl. 149; s. c. 1 Beale's Cases on Conflict of Laws, 427.

[2] LeMesurier *v.* LeMesurier [1895] A. C. 517, s. c. 1 Beale, 388.

[3] Sewall *v.* Sewall (1877) 122 Mass. 156, 162; Minor, Conflict of Laws, 205.

[4] White *v.* White (1893) 18 R. I. 292; Minor, Conflict of Laws, 101; 9 Am. & Eng. Ency. of Laws, 2d ed. 738.

[5] Colvin *v.* Reed (1867) 55 Pa. 375; Minor, Conflict of Laws, 102.

(C) The court where the parties are bona fide resident has jurisdiction. This is the Roman rule and has been followed by the Dutch and the Scotch.[1]

The proposition now suggested is that any competent court having actual jurisdiction over the parties shall have jurisdiction over divorce between those parties.

A divorce granted under the rule B. 3 (the court of the petitioner's domicile alone has jurisdiction) must be recognized in other States, under the "full faith and credit" clause of the constitution of the United States.[2]

The refusal of any court to recognize a divorce so granted is ground for an appeal to the Supreme Court of the United States.[3]

But it does not follow that the courts of all the states will grant divorces under this rule. Many do not.

The question of domicile of the wife is of importance under the rules concerning jurisdiction over divorce in the United States.

1. It is generally held that, after cause for divorce by the husband's conduct, the wife may acquire a separate domicile anywhere.[4]

Any divorce granted under this rule will be protected under the doctrine of Atherton *v.* Atherton (1900) 21 Sup. Ct. Rep. 544.

In one state only, Vermont, is a wife allowed a separate domicile from that of her husband, even though it be not for the purpose of securing divorce. In Rhode Island, the wife retains the domicile of the husband "so long as the unity of the marriage relation continues."[5]

2. Some States protect the wife in allowing her to elect between the husband's domicile at the time cause for divorce arose and his later domicile, if he changes it.[6]

3. Other States do not allow this election although protecting the wife

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[1] Weatherley *v.* Weatherley (1879) Transvaal Prov. Rep. 66; s. c. 1 Beale's Cases on Conflict of Laws, 420.

[2] Atherton *v.* Atherton (1900) 21 Sup. Ct. Rep. 544.

[3] Andrews *v.* Andrews, U. S. Sup. Ct. Aps. No. 6, Feb. 16, 1903, p. 237 (from Mass. Sec. 176 Mass. 92, s. c. 57 N. E. 333). The parties were married and lived in Massachusetts. The husband went to South Dakota to obtain a divorce for a cause arising in Massachusetts while the parties were domiciled there (desertion), not a cause for divorce in Massachusetts, but which was a cause for divorce in South Dakota. This was in violation of 2 Mass. Comp. Laws, 1902, Ch. 152, p. 1357; Pub. Stat. Ch. 146, § 41. A decree of divorce was obtained by the husband, in South Dakota, through collusion with the wife. *Held*, that the full faith and credit clause of the constitution of the United States is not violated by the refusal of the Massachusetts courts to give effect to such a decree. (It would seem that the decree obtained in South Dakota was void, even under the law in that state, the wife having colluded with the husband by consenting in writing to the granting of a decree for desertion.)

[4] Ditson *v.* Ditson (1856) 4 R. I. 87, 107 (semble); White *v.* White (1893) 18 R. I. 292; Minor Conflict of Laws, 101; Am. & Eng. Ency. of Law, 2d ed. Title, Divorce.

[5] Howland *v.* Granger (1900) 22 R. I. 1.

[6] Sewall *v.* Sewall (1877) 122 Mass. 156.

to the extent of allowing her to retain the domicile her husband had when the cause for divorce arose; i. e., subsequent changes of domicile by him do not affect her domicile.[1]

4. I know of no State in the United States following the English rule that the wife's domicile is always that of her husband.

We find that divorce is the only branch of English and American law that depends solely upon the parties' domicile. It is said that it is necessary because the State has a peculiar interest in marital relations. So it has, but this has not prevented the usual rule from obtaining under other systems of law, that jurisdiction over the parties gives jurisdiction over divorce between them. The question is whether the latter theory would not afford protection against the gross evils of the present system, i. e., the absence of uniformity, the hardships, sometimes upon the wife, sometimes upon the husband, involved in many of the above rules; the inevitable fraud and collusion, so commonly practiced, inevitable because the whole matter rests on question of domicile, which is principally a question of fact, and almost entirely of the intention of one who has a strong interest in misrepresenting that fact. The interest of the State, certainly great, is protected, under the rule of the Roman law herein suggested as the right one to follow, by restricting jurisdiction over divorce to actual jurisdiction over the parties, and the interpretation of this peculiar contract by various courts, guided by the decisions of the Court of the State where the marriage contract was entered into would tend to uniformity. Such a system would dispose of the vexed questions arising out of notice, actual and constructive, now disturbing the Courts, the injustice of a decree granted against one who is absent would be removed and order would be evolved out of the chaos and the conflict between the principles, or rather the absence of any scientific principle now reigning over divorce in the United States.

Of course, new difficulties would arise. They always do, whatever system we may frame. They are inherent in all human systems, but it is submitted that they could not be more appalling than those now arising and found hitherto to be insurmountable. They would, however, be found more soluble under a guiding scientific principle than they are now under no principle at all. What, for instance, should the law be, if a marriage takes place in South Carolina, where no cause for divorce is recognized, the parties move to another State where adultery is recognized as a cause for divorce, and one of the two there commits adultery that is made the ground for a petition for divorce in such State? Would the system proposed require uniformity throughout the States in the causes for which divorce may be granted? Or suppose a husband and wife do separate and move into separate States, the husband then to be sent to States Prison for an offence committed there, and that such imprisonment is ground for divorce in that State, but not in the State where the marriage took place nor in the State where the wife lives? What law shall then determine whether there has been a breach of the marriage contract?"

[1] Colvin *v.* Reed (1867) 55 Pa. 375.

Even though no state has yet adopted in its entirety the Divorce Procedure Act recommended by the Conference, some of its features have been adopted, and probably more will be, and more states will follow the examples set, and adopt some of its features that other states have adopted. However, even should no general adoption of our act result, it cannot be said that the work of the Conference is a failure. It will have shown, at least, that such a law is not the one called for. If so, the question then is, what is the legislation that is called for? Why should not the general rule suggested, be adopted, that any competent court, having actual jurisdiction over the parties, shall have jurisdiction over divorce between those parties, irrespective of the vexatious question of domicile? Would not the cause of justice and the peace and quiet of the state, be better subserved by such a rule? What would be the effect of such a law as this?

"SEC. 1. The———Court of this State now having jurisdiction over petitions for divorce, shall henceforth have jurisdiction over all such petitions only when actual service of process shall have been made upon the respondent within this State, irrespective of any question of domicile.

SEC. 2. In hearing and determining all such petitions, the law of the state where the marriage took place, in conjunction with the law of the state where the cause for divorce arose, shall be the law under which the court shall determine the case.

SEC. 3.—All acts and parts of acts inconsistent herewith are hereby repealed."

AMASA M. EATON.